United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2213

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
B15

UNITED STATES OF AMERICA, Appellee, -against- FRANK ATKINS, Appellant.	Docket No. 74-2213

PETITION FOR REHEARING
WITH SUGGESTION
FOR REHEARING EN BANC

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- FRANK ATKINS, Appellant.	Docket No. 74-2213

PETITION FOR REHEARING
WITH SUGGESTION
FOR REHEARING EN BANC

This petition for rehearing, with suggestion for rehearing en banc, is filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure, from a judgment of this Court (Clark, Associate Justice; Moore and Timbers, Circuit Judges) entered on November 26, 1974, affirming in open court without opinion a judgment of the United States District Court for the Southern District of New York convicting appellant of aiding and abetting in the uttering of a forged

United States Treasury obligation, (18 U.S.C. § 495) and of possession of an unregistered firearm with no serial number, in violation of the Federal firearms statute (26 U.S.C. §§5861(d) and (i); 5871).

Appellant's brother, Kenneth Atkins, was arrested by Federal agents while in the act of uttering a stolen Veterans Administration education check at the check cashing store of Howard Stein. Appellant entered that store only after the agents had entered it and were interrogating Kenneth about the check. In addition to appellant's presence in the store at that time, the only evidence to link appellant to the check was a statement made by appellant to one of the agents at the Post Office. In it, appellant acknowledged involvement in prior unsuccessful attempts to cash the check.

At trial both Kenneth and appellant testified that appellant had nothing to do with the check. Appellant explained that his confession was the result of a threat by the agents that his brother would get fifteen years' imprisonment for cashing the check.

On cross-examination, the Assistant United States Attorney asked appellant about his attempts to find employment. This question was asked to set the framework for a further inquiry as to whether appellant was an escapee from a South Carolina prison camp. The Government's theory of admissibility

for this evidence was that the escape precluded appellant from obtaining employment, thus resulting in a need for funds which in turn created a motive to steal and cash the check.*

Counsel objected to the inquiry concerning appellant's ability to get a job. The objection was overruled, and appellant testified that he had had some jobs, and was earning enough money at these odd jobs to live, but that he could not get a more permanent job because he suffered from eczema and asthma.

Defense counsel objected to any inquiry about appellant's prior custody. This also was overruled, and the prosecutor then asked appellant if he had escaped from custody and if that was why he could not get a job. The court stopped the inquiry when appellant responded "no."

No charge on the use of this evidence was given to the jurors.

I.

The District Judge permitted the Government to introduce evidence of appellant's escape from North Carolina

---

* Defense counsel sought a ruling on the admissibility of evidence of escape prior to the trial. The judge overruled this objection, saying "[the escape] goes to the guts of the matter" (Tr. 88).

prison camp on the theory that the escape prevented appellant from obtaining employment, which produced poverty, which in turn generated a desire for money which resulted in the uttering of the check.* The record shows, however, that the Government failed to produce any evidence that would permit such a chain of inferences (United States v. Mullings, 364 F.2d 173 (2d Cir. 1966); see 1 Wigmore, ON EVIDENCE, §117 at 557-559 (3d ed. 1940)), and the introduction of the fact of appellant's prison escape with the unavoidable inference that appellant had a prior criminal record** was so prejudicial that reversal is required.

The Government did not, and indeed could not, establish, even by inference, that the escape resulted in unemployment and therefore the line of questioning was improper from the start. Appellant testified that although there were some jobs he could not perform because of eczema and asthma (Tr. 134-135), he did have odd jobs which gave him a source of income.(Tr. 136). The Government produced no evidence to refute this or to show that appellant was impoverished. What the Government did show was the fact that appellant had es-

---

* On the appeal, the Government also argued that the evidence was admissible to show that the real reason for appellant's inability to get a job was not eczema or asthma as he claimed, but his escape. However, the Government cannot introduce evidence for the purpose of rebutting it with otherwise inadmissible testimony. United States v. Mullings, 364 F.2d 173, 175(2d Cir. 1966); see Walder v. United States, 347 U.S. 62(1954); Agnello v. United States, 269 U.S. 20 (1925).

** In a pre-trial ruling, the judge refused to permit the Government to inquire with respect to the conviction.

caped and that he had a prior criminal record from which the jury could infer he was a bad man. Michaelson v. United States, 335 U.S. 469, 475 (1948).*

As in Mullings, the chain of inferences necessary to make the evidence relevant was so speculative as to be improper. In Mullings, the Government introduced as part of its direct case pre-arraignment statements by Mullings that he did not use drugs and earned $150 per week. Then the Government introduced evidence to show that Mullings did use narcotics and earned only $65 per week to show a motive for the theft of property. When finding this error, Judge Lumbard, writing for the Court, stated:

> . . . Although a lack of money is admissible to show a possible motive for some crimes, 2 Wigmore, Evidence §§392 (3d ed. 1940), in this case the chain of inferences is too speculative. There was not evidence how often Mullings took narcotics, or what the maintenance of such a habit would cost him or that he was unable to obtain narcotics because of a shortage of money. In effect the evidence only shows that he might have lacked money and therefore might have had a motive to commit the crime - from which the judge inferred that he did so. We think this is too remote; the need for money being speculative the motivation can be no better. Whatever probative value this evidence had, it was outweighed by its prejudicial effect. It would place far too much stress on the mere fact of his addiction alone.
>
> (364 F.2d at 175-6)

* A similarly compelling and prejudicial inference was that appellant had drawn his brother into the crime, an argument made by the Government in summation (84).

As in Mullings, on this record, the jury was given no basis for making permissible inferences to support a connection between the escape and the crime charged. Thus, the only way the jurors could have handled the evidence of escape was to conclude that appellant was a bad man who would tend to commit crimes.* In fact, even in his summation the prosecutor abandoned his theory of admissibility and did not argue that the escape produced unemployment and poverty resulting in crime. Instead, he argued only that appellant was an escapee who did not return to the camp from which he had escaped. His one reference to poverty was to call appellant an escapee with no money -- a statement which is refuted by the record and which does not show the necessary connection between the two.

The prejudice to appellant from the admission of this evidence is apparent. The Government could produce no evidence of appellant's direct participation in the uttering of the check. The evidence of aiding and abetting rests virtually entirely on appellant's own confession. Appellant, however, explained in his testimony at trial that he made the confession to protect his brother and that he had, in fact, had nothing to do with the crime. Kenneth's trial testimony supported appellant's assertion of innocence.

* Since the evidence here does not show motive, cases which permit admission of evidence to show motive do not help the Government, e.g., Cantrell v. United States, 323 F.2d 613 (D.C. Cir. 1963); United States v. Johnson, 254 F.2d 175 (2d Cir.1948).

The other piece of evidence relating to appellant's guilt -- that appellant failed to reveal his identity at the time he entered the check cashing store -- was also disputed. If, as appellant asserted, he said he was Atkins, that would strongly support appellant's contention that he did not know what his brother was doing in the store.

Since the improper admission of "bad man" evidence must have influenced the jury's appraisal of appellant's credibility, the conviction for violation of the gun laws must also be reversed. Appellant asserted that he did not know there was a gun in the raincoat pocket, and without that knowledge he was not guilty of the crime. Thus, credibility was critical on this count as well,* and the spillover effect of the improper evidence requires reversal.

Even without the spillover effect, it is proper to review the judgment on the uttering count and to reverse

---

* The jurors' acquittal of appellant of theft of mail could easily have come from the Government's failure to prove that crime rather than not crediting the defense. Mrs. Smith's testimony was that she opened the mailbox, tore open the envelope, and then replaced it. However, when she returned to pick up the mail, the letter was gone with no sign the mailbox had been broken into.

as to that. United States v. Adcock, 447 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 939 (1971); United States v. Febre, 425 F.2d 107, 113 (2d Cir.), cert. denied, 400 U.S. 849 (1970).*

CONCLUSION

For the above-stated reasons, the petition should be granted and the judgment of the District Court should be reversed, and the case remanded for a new trial.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

December 7, 1974

---

* In United States v. Gaines, 460 F.2d 176 (2d Cir.), cert. denied, 409 U.S. 883 (1972), there was no review of the issue because a review required a prior remand for a hearing which would produce no change in sentence. In the interest of preserving judicial efforts, this Court refused to remand, and affirmed the conviction. There is no such problem in this case. Further, the issue raised here is significant and is one in which guidance from this Court is needed.

I certify that a copy of this petition has been sent to the United States Attorney for the Southern District of New York.

Phyllis Skloot Bamberger

PHYLLIS SKLOOT BAMBERGER

12/9/74.